Supreme Court, U.S.
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No. 0-1851

IN THE SUPREME COURT OF THE UNITED STATES

E. JOSEPH FACE, JR., COMMISSIONER OF FINANCIAL INSTITUTIONS, BUREAU OF FINANCIAL INSTITUTIONS, VIRGINIA STATE CORPORATION COMMISSION, and SUSAN E. HANCOCK, DEPUTY COMMISSIONER, BUREAU OF FINANCIAL INSTITUTIONS, VIRGINIA STATE CORPORATION COMMISSION,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

1. Whether this Court should decline to issue a writ of certiorari to review a finding by a unanimous panel of the United States Court of Appeals for the Fourth Circuit holding that the Virginia statutes limiting prepayment penalties on home mortgages are preempted by federal law where that finding is not in conflict with the decision of any other federal or state appellate court and simply involves the application of settled law to undisputed facts?

THE PARTIES

The National Home Equity Mortgage Association is a national trade association focusing primarily upon the home equity lending market. Members of this voluntary trade association include banks, mortgage lending corporations, secured equity lenders, law firms, title insurers, consulting firms, and appraisal services corporations. Its membership includes entities that are licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to conduct business in the Commonwealth of Virginia, and that also qualify as housing creditors under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06.

E. Joseph Face, Jr. is the Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission. He is responsible for the division that administers state laws regulating financial services institutions licensed by the Bureau. He executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia who also qualify as housing creditors under the Parity Act.

Susan E. Hancock is the Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission. She is responsible for the administrative section which examines and supervises the operations of financial services institutions (except for state-chartered banks and credit unions) licensed by the Bureau. She executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia who also qualify as housing creditors under the Parity Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondent National Home Equity Mortgage Association hereby discloses that it is a national trade association as noted *supra*, that it has no parent corporation, and that there is no publicly held company that owns 10% or more of its stock.

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Respondent National Home Equity Mortgage Association ("NHEMA") respectfully requests this Court to deny the Petition for Writ of Certiorari to review the unanimous panel decision of the United States Court of Appeals for the Fourth Circuit. The court of appeals applied well-settled law to undisputed facts to conclude that Virginia statutes limiting prepayment penalties on home mortgages, Va. Code Ann. §§ 6.1-330.83 & 6.1-330.85, are preempted by 12 U.S.C. §§ 3801-06 (the "Parity Act"), which has the stated Congressional purpose of allowing state-chartered housing creditors to make, purchase, and enforce alternative mortgage transactions on equal terms with competing federally chartered entities "notwithstanding any State constitution, law, or regulation"[1] to the extent that their "transactions are in conformity with the regulations issued by the Federal agencies."[2]

OPINIONS BELOW

Petitioners have correctly cited the official reports of the opinions and orders entered below. Although Petitioners have correctly replicated the panel decision below, (Pet. Writ Cert. at 23a-36a), their recital of the district court's decision contains minor typographical errors at pages 6a-7a, and 11a.[3]

STATEMENT OF JURISDICTION

Respondent does not dispute Petitioner's Statement of Jurisdiction. (Pet. Writ Cert. at 1.)

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[1] 12 U.S.C. § 3803(c).

[2] 12 U.S.C. § 3801(b).

[3] There are additional typographical errors in their Appendix at pages 37a-38a, 45a, 57a, 60a-65a, 71a-72a, 75a-76a, and 78a-79a. However, it does not appear that these errors result in any material misrepresentation of the authorities reproduced in their Appendix.

COUNTERSTATEMENT OF THE CASE

I. Background.

In the late 1970s and early 1980s, the home mortgage lending market deteriorated due to "increasingly volatile and dynamic changes in interest rates" that impaired "the ability of housing creditors[4] to provide consumers with fixed-term, fixed-rate credit secured by interests in real property . . . and . . . dwellings." 12 U.S.C. § 3801(a)(1) (internal footnote added). *See also* Nat'l Home Equity Mortgage Ass'n v. Face, 239 F.3d 633, 635 (4th Cir. 2001) (reproduced in Pet. Writ Cert. at 25a.)

Congress recognized this trend and found that federal regulations governing alternative mortgage transactions[5] had heavily favored federally chartered lending institutions to the detriment of credit availability and stability. Because these transactions were deemed "essential to the provision of an adequate supply of credit secured by residential property necessary to meet the demand during the 1980s," 12 U.S.C. § 3801(a)(2), Congress enacted the Parity Act to create a level playing field for all housing creditors and to eliminate any discriminatory impact that federal regulations applicable to federally chartered lenders had upon state-regulated lenders. 12 U.S.C. § 3801(a)(3), (b).

The Parity Act satisfied these objectives by allowing state-chartered housing creditors to make, purchase, and

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[4] The Parity Act defines the term "housing creditor" in relevant part as "any person who regularly makes loans, credit sales, or advances secured by interests in properties . . . or any transferee of them." 12 U.S.C. § 3802(2)(C)-(D).

[5] The Parity Act defines the term "alternative mortgage transaction" at 12 U.S.C. § 3802(1). A quintessential alternative mortgage transaction is an adjustable rate mortgage. 12 U.S.C. § 3802(1)(A).

enforce alternative housing transactions in accordance with federal law "notwithstanding any State constitution, law, or regulation" to the extent that such transactions conformed to a series of regulations issued by the Director of the Office of Thrift Supervision ("OTS") for federally chartered savings and loan associations. 12 U.S.C. § 3803(a)(3), (c) (quotation from 12 U.S.C. § 3803(c)).[6]

Notwithstanding this express preemption provision in the Parity Act, Congress afforded each state the opportunity to opt out of the federal preemption scheme between October 15, 1982, and October 15, 1985, by enacting, or adopting by referendum or constitutional amendment, a new law, stating explicitly by its terms, that that state "does not want the preemption provided in [12 U.S.C. § 3803(c)] to apply with respect to alternative mortgage transactions (or to any class or type of alternative mortgage transaction) subject to the laws of such state", with exceptions not relevant to this case. 12 U.S.C. § 3804(a). Only six states timely opted out of the Parity Act's operation in the statutorily prescribed manner.[7]

The Commonwealth of Virginia admittedly failed to enact or adopt any such law. (Pet. Writ Cert. at 4) ("Some five or six states did opt-out; Virginia did not."). By acts not passed within the mandatory opt-out period and not citing to the Parity Act, the Virginia General Assembly purported to cap and regulate prepayment penalties on mortgages issued within the Commonwealth, including alternative mortgage transactions made by lenders or housing creditors subject to

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[6] The Director of the OTS has rulemaking authority under 12 U.S.C. §§ 1463(a) & 1464(a) to regulate federally chartered entities, and has given them the federal right to charge uncapped prepayment penalties on their alternative mortgage transactions. 12 C.F.R. § 560.2(a), (b)(5).

[7] OTS Extends Federal Preemption to HELOCs, Nat'l Mortgage News, Apr. 21, 1997 (noting that "loans made in the other 44 states can be made in accordance with OTS rules on late charges, prepayments, interest rate adjustments and ARM disclosures") (available at 1997 WL 8644294).

federal law under the Parity Act. *See* 1987 Va. Acts ch. 622, *codified at* Va. Code Ann. §§ 6.1-330.83 & 6.1-330.85.

Because Virginia did not opt out of the Parity Act's operation, state-chartered housing creditors licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, were able to make, purchase, and enforce their alternative mortgage transactions pursuant to the panoply of federal regulations that apply to federally chartered housing creditors "notwithstanding any State constitution, law, or regulation." 12 U.S.C. § 3803(c).

Pursuant to its rulemaking authority and 12 U.S.C. § 3803(a)(3), the FHLBB identified a set of federal regulations that must be adhered to before state-chartered housing creditors could invoke the benefits of federal law. Although the initial set of threshold regulations did not include the one allowing federally chartered housing creditors to charge contractually agreed-to prepayment penalties without any cap, this benefit was still made available to state-chartered housing creditors meeting the prerequisites set forth in the Parity Act.

In other words, if a state-chartered housing creditor adhered to that set of regulations identified by the FHLBB, then it could operate on par with federally chartered lenders, and the same law – federal law, including the ability to charge prepayment penalties without limitation and notwithstanding any contrary state statute – would apply to it. This is what Congress intended when it enacted the Parity Act and this is the regime that applied when the OTS as the successor agency to the FHLBB engaged in rulemakings to realize the stated purposes of the Parity Act. *See* 12 U.S.C. § 3801.

Consequently, in 1996, the OTS issued an opinion concluding that the Parity Act should be interpreted to

preempt a Wisconsin state statutory restriction on prepayment penalties. Effect of Parity Act on Wisconsin Prepayment Penalty Statute, OTS Op. Chief Counsel, 1996 OTS LEXIS 19 (Apr. 30, 1996) (reproduced in Pet. Writ Cert. at 71a-77a). It also issued a rule which explicitly stated that prepayment penalties are covered by the Parity Act. 61 Fed. Reg. 50,951, 50,954 (1996) (adopting 12 C.F.R. § 560.220 as a new regulation amending 12 C.F.R. § 545.33(b), so that 12 C.F.R. § 560.34 governing prepayment penalties would be identified as being applicable to any alternative mortgage transactions.) In 1997, the Maryland Attorney General ruled to the same effect as the OTS opinion. 82 Md. Op. Att'y Gen. No. 97-018 (Aug. 19, 1997) (available at 1997 Md. AG LEXIS 22).[8]

Thus, the OTS has stated in both an opinion letter and by rule that its regulation allowing federally chartered lenders to charge prepayment penalties is applicable to alternative mortgage transactions made by state-chartered lenders in states that failed to opt out of the preemption provision of the Parity Act.

The OTS is authorized by 12 U.S.C. § 3803(a)(3) to promulgate regulations governing alternative mortgage

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[8] *See also* Debtor/Creditor -- Prepayment Penalties, N.J. L.J., May 18-24, 2000 ("Although the [New Jersey] Prepayment Law, by its terms, applies to plaintiffs' mortgage loan, the court finds that it is preempted by the [Parity Act]. In failing to opt out of the Parity Act, New Jersey chose to accept the federal 'regime'; it cannot now rescind its decision to accept the Act's presumption merely because it disagrees with the Office of Thrift Supervision's current regulations. A paramount purpose of the Act is to create parity between state and federal lenders who engage in AMTs. The court finds that the 1996 opinion and the OTS's regulations governing prepayment penalties are, to the extent that they preempt state law, a permissible interpretation of the congressional authority vested in the OTS under the Parity Act.") (discussing the effect of Shinn v. Encore Mortgage Servs., Inc., 96 F. Supp. 2d 419 (D.N.J. 2000)).

transactions to the extent that the OTS has the power to issue regulations governing federally chartered institutions. Both the Parity Act and its legislative history, respectively, permit and envision that this authority will be exercised from time to time. *Id.* (referring to regulations "as issued" by the OTS); S. Rep. 97-463 at 55 (noting the Congressional expectation that "any future amendments that the agencies [including the OTS] make to regulations that are within the score of this title will conform to the objectives of this title"). The OTS has now exercised this authority to clarify that the federal regulation regarding prepayment penalties applies to alternative mortgage transactions made, purchased, and enforced in conjunction with the Parity Act. (*See* Pet. Writ Cert. at 78a-79a.) The terms of the Parity Act do not limit the scope of the agency's rulemaking authority.

II. Events Giving Rise to This Litigation.

In April 1999, an official newsletter authorized by the Petitioners was issued to Virginia mortgage and consumer finance licensees. The feature article announced Petitioners' contention that the Parity Act does not preempt Virginia statutory laws limiting prepayment penalties on alternative mortgage transactions. Federal Preemption of Virginia's Prepayment Penalty Laws, Compliance Connection, April 1999, at 1, 3 [hereinafter "Compliance Connection"] (reproduced in Pet. Writ Cert. at 68a-70a).

Speaking on behalf of the Virginia State Corporation Commission's Bureau of Financial Institutions, this article stated that housing creditors exercising their federal right to charge prepayment penalties exceeding Virginia's statutory caps would be subject to a series of punitive measures.

> Bureau examiners will continue to cite violations of Virginia statutes relating to prepayment penalties. Licensees found in

> violation will be required to refund prepayment penalties collected, in excess of the state law limits. In addition, notification of Virginia's limit on prepayment penalties must be provided to current borrowers so they will be aware that any higher penalty cannot be enforced. A copy of the notification must be made a part of the permanent loan file, and investors who have purchased loans providing for penalties in excess of the penalty set forth in the Virginia Code must also be notified.
>
> In addition to possible revocation of license, such violations can be referred to the Attorney General's office for investigation pursuant to Virginia Code § 6.1-430.

Compliance Connection at 3 (reproduced in Pet. Writ Cert. at 69a-70a).

III. Procedural History.

On June 1, 1999, NHEMA filed in the United States District Court for the Eastern District of Virginia a Verified Complaint for Declaratory Relief and Preliminary and Permanent Injunctions for Violation of 42 U.S.C. § 1983. In its Verified Complaint, NHEMA asserted *inter alia* that the "Supremacy Clause guarantees that federal laws made under the authority of the United States shall prevail over contrary state laws" and that Congress through the Parity Act created immediately enforceable rights under 42 U.S.C. § 1983. (Verified Compl. ¶¶ 31-32) (quotation at ¶ 32). NHEMA sought appropriate declaratory and injunctive relief, as well as an award of reasonable attorneys' fees and costs under 42 U.S.C. § 1988. (*Id.*, Prayer for Relief, ¶¶ 1-3.)

By order dated June 14, 1999, the district court issued a preliminary injunction that barred Petitioners from

> enforcing with respect to any alternative mortgage transaction made by a housing creditor in compliance with the [Parity Act], [Petitioners'] announced position that such compliance will nonetheless not preempt Va. Code §§ 6.1-330.83 and 6.1-330.85.

(Order June 14, 1999, at 1) (reproduced in the Appendix to this Brief in Opposition at A-1).

After reviewing the oral and written arguments made by the parties in support of their cross-motions for summary judgment, the district court granted NHEMA's motion, denied Petitioners' cross-motion, and "permanently enjoin[ed] [Petitioners] from enforcing their announced position that the Parity Act does not preempt Virginia state law limiting prepayment penalties on alternative mortgage transactions." Nat'l Home Equity Mortgage Ass'n v. Face, 64 F. Supp. 2d 584, 586 (E.D. Va. 1999), *aff'd*, 239 F.3d 633 (4th Cir. 2001) (reproduced in Pet. Writ Cert. at 2a).[9]

Petitioners appealed this decision to the United States Court of Appeals for the Fourth Circuit. In their appellate briefs, Petitioners generally argued that the Parity Act did not prevent them from enforcing Va. Code Ann. §§ 6.1-330.83

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[9] It also denied the Cross-Motion for Summary Judgment filed by the Honorable Mark L. Earley, Attorney General of Virginia, who intervened in the district court proceedings. Although the Attorney General's Office joined in Petitioners' appeal to the court of appeals, it has filed a Waiver with this Court stating that it now only represents the Attorney General's interests and that the Attorney General is not a party to the Petition for Writ of Certiorari filed by Petitioners. (Letter from A. Ann Berkebile, Assistant Attorney General, Commonwealth of Virginia, to William K. Suter, Clerk, Supreme Court of the United States 1 & attach. (June 29, 2001).)

and 6.1-330.85. (Br. Appellants at 9-28; Reply Br. Appellants at 1-19.) They did not argue in the court of appeals, as they seek to do here, that the Parity Act violates the Tenth Amendment or that the Parity Act has to be harmonized by the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA").

In a unanimous decision, a three-judge panel affirmed the district court's conclusion that the Parity Act preempted conflicting Virginia statutes. After examining general preemption principles defined by opinions of this Court, as well as the express language and legislative history of the Parity Act, the panel noted that in "enacting the Parity Act, Congress clearly intended to preempt state law"[10] and concluded that

> non-federally chartered housing creditors in Virginia – as they are defined in 12 U.S.C. § 3802(2) – may elect to have their alternative mortgage transactions governed by the federal law applicable to federally chartered housing creditors engaging in similar transactions by complying with that law, and when they do, that law, which includes 12 C.F.R. § 560.34 (regulating prepayments and authorizing a prepayment fee), preempts Va. Code Ann. §§ 6.1-330.83 and 6.1-330.85. This conclusion is required by 12 U.S.C. § 3803 and is clearly consistent with the raison d'etre of the Parity Act – giving State-chartered lending institutions parity with federally chartered lending institutions. *See* 12 U.S.C. § 3801(b).

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[10] Nat'l Home Equity Mortgage Ass'n, 239 F.3d at 637 (reproduced in Pet. Writ Cert. at 29a).

Nat'l Home Equity Mortgage Ass'n, 239 F.3d at 640 (reproduced in Pet. Writ Cert. at 35a-36a).

A Petition for Writ of Certiorari followed, raising two issues that were not argued to the court of appeals and a third that does not present "an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c).

REASONS FOR DENYING THE WRIT

This § 1983 action is a garden-variety case of federal preemption of state law under the Supremacy Clause. In 1982, Congress responded to the widespread concerns that unduly restrictive state laws hindered the competitiveness of state-chartered housing creditors and home mortgage lenders vis-à-vis their federally chartered counterparts. Congress' chosen solution was to create a federal safe harbor whereby state-chartered lenders could avail themselves of more liberal federal lending rules by complying with an identified set of federal regulations. Nat'l Home Equity Mortgage Ass'n, 239 F.3d at 640 (noting that if "a state lender conforms to the regulations listed in the regulation implementing § 807(b) [of the Parity Act], then it will enjoy the preemptive protection that the Act grants in 12 U.S.C. § 3803(c)").

Petitioners challenge the federal government's power to take this action on three grounds, two of which were not raised in the court of appeals below.

Their constitutional argument that the panel decision "sanctions an abrogation of Virginia's constitutional prerogatives, under the Tenth Amendment of the Constitution of the United States, without Virginia's knowing consent" was not raised to the court of appeals. (Pet. Writ Cert. at 10-11) (quotation at 10). Likewise, their argument that "[t]he decision of the appeals court failed to

reconcile properly the preemptive reach of [the Parity Act] with the preservation of state prepayment penalty laws under [DIDA])" was not presented to the panel for its consideration. (Pet. Writ of Cert. at 11-12) (quotation at 11). These arguments have been waived.

Nevertheless, even if these arguments were properly before this Court, they would be unavailing. Petitioners' essential contention is that the public policy of the Commonwealth of Virginia with respect to this area of law is frustrated by the preemptive effect of the Parity Act. In other words, their core argument is that State public policy should prevail over that adopted by Congress. This outcome is exactly what the Supremacy Clause[11] was designed to prevent, particularly when as here a core area of Congress' delegated powers is implicated.

Petitioners' third argument is that "[t]he appeals court concluded, erroneously, that Virginia law was preempted . . . ." (Pet. Writ of Cert. at 13-23) (quotation at 13). The Fourth Circuit affirmed the district court's conclusion that Congress fully intended the Parity Act to preempt conflicting state law in those states like Virginia that did not timely opt out of its operation in the statutorily prescribed manner. This conclusion is amply supported by this Court's preemption jurisprudence and does not conflict with any federal or state court decision.

Congress made the determination that consumers are better served by having greater credit availability and more credit options for home mortgage financing. The fact that

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[11] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

Congress struck a different balance than that reached by the Virginia General Assembly (or the Virginia State Corporation Commission's Bureau of Financial Institutions) is an unexceptional characteristic of federal preemption cases like this one.

Because this § 1983 action involves purely an issue of federal statutory interpretation and the operation of the Supremacy Clause, and because it neither raises any unique statutory issue nor presents any conflict in the interpretation of federal law, the Petition for Writ of Certiorari should be denied.

1. Petitioners' first claim that the Parity Act abrogates constitutional prerogatives was not raised to the panel below and is without merit because the Parity Act represents a valid exercise of Congress' plenary authority under the Commerce Clause and does not violate Tenth Amendment rights.

Petitioners' assertions that "[l]aws governing lending practices traditionally have been a state police law prerogative" and that both "the 1996 OTS actions and the judgment of the appeals court in this case effectively deprive Virginia of its Tenth Amendment legislative authority without fair notice" should be summarily rejected. (Pet. Writ Cert. at 10-11.)

First, it is well-settled that Petitioners' failure to raise its Tenth Amendment argument in their appellate briefs below prevents this Court from analyzing it now on certiorari.[12] *See, e.g.*, Blessing v. Freestone, 520 U.S. 329,

[12] There are no "exceptional circumstances" present that should compel a contrary conclusion. *See* Heckler v. Campbell, 461 U.S. 458, 469 n.12 (1983) (noting that this Court will review issues not raised below "'only in exceptional circumstances'") (citation omitted).

340 n.3 (1997) (declining to consider two issues in part because they had not been raised below); Delta Air Lines, Inc. v. August, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us. We therefore affirm the judgment of the Court of Appeals."); Davis v. United States, 495 U.S. 472, 489 (1990) ("Because this argument was neither raised before nor decided by the Court of Appeals, we decline to address it here.") (citations omitted); Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 94 n.18 (1989) (refusing to consider claim "because [it] was neither presented to nor decided by the Court of Appeals below, and thus is not properly before us").

In addition to Petitioners' procedural default,[13] their argument necessarily fails on the merits because the Parity Act implicates Congress' core and plenary powers under the Commerce Clause[14] and concerns an area of commerce that has historically been subject to pervasive federal legislation.

Congress' power to regulate the instrumentalities and items of interstate commerce is not only plenary in nature, Cleveland v. United States, 329 U.S. 14, 19 (1946); Hodel v. Virginia Surface Mining and Reclamation Ass'n., Inc., 452 U.S. 264, 276 (1981), but also "complete in itself" since it "may be exercised to its utmost extent, and acknowledges no

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[13] The district court had correctly rejected Tenth Amendment arguments raised by Petitioners in their cross-motion for summary judgment. Nat'l Home Equity Mortgage Ass'n, 64 F. Supp. 2d at 591-92 (reproduced in Pet. Writ Cert. at 13a-15a).

[14] "The Congress shall have the Power to . . . . regulate Commerce . . . among the several States" and to "make all Laws which shall be deemed necessary and proper for carrying into Execution the foregoing Power[] . . . ." U.S. Const. art. I, § 8, cl. 1, 3, 18.

limitations, other than are prescribed by the Constitution." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824); Hodel, 452 U.S. at 276; United States v. Carolene Prods. Co., 304 U.S. 144, 147 (1938); United States v. Darby, 312 U.S. 100, 114 (1941). Furthermore, the commerce power extends to the Congressional regulation of local activities posing substantial and harmful effects upon interstate commerce. *See* Fry v. United States, 421 U.S. 542, 547 (1975); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 302 (1964). Congress having found that the activities being regulated negatively affect interstate commerce, federal courts "need inquire only whether the finding is rational." Hodel, 452 U.S. at 277.

From this structure, it "follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress." United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942). Hence, this Court has approved "any number of federal statutes enacted under the commerce power that [effectively] pre-empt particular exercises of state police power," Hodel, 452 U.S. at 292 (citations omitted), expressly rejecting arguments that Congress invades subject matters purportedly "reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Id.* at 291 (citations omitted).

It is obvious here that Congress in approving the Parity Act exercised its plenary Commerce Clause powers because (1) banking constitutes a recognized form of interstate commerce, United States v. Citizens and S. Nat'l Bank, 422 U.S. 86, 91 (1975), (2) loans secured by interests in real property are recognized forms of banking, 12 U.S.C. § 3801, and (3) the legislative history of the Parity Act demonstrates that alternative mortgage lending "is essential

to the maintenance of an adequate supply of housing credit for the Nation . . . ." S. Rep. 97-463, at 54 (1982).

The area being regulated here is not converted into a matter of exclusive state concern by labeling it "consumer protection." (*See* Pet. Writ Cert. at 8) ("Virginia and other states . . . regard their laws restricting prepayment penalties as important protections for their citizens . . . ."). Federal law is a major repository for consumer protection legislation in the consumer finance arena, as is readily evinced by Congressional enactment of the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 *et seq.*, the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, and the Federal Debt Collections Practices Act, 15 U.S.C. §§ 1692, *et seq.* These laws provide crucial substantive and legal protections for consumers largely because Congress clearly expressed its intent, like it did in the Parity Act, that federal safeguards will preempt conflicting state statutes regulating the same subject area. *See, e.g.*, RESPA Reg. X, 24 C.F.R. § 3500.13, 12 U.S.C. foll. § 2617; 15 U.S.C. § 1681t; 15 U.S.C. § 1610; 15 U.S.C. § 1692n.

The district court below correctly held that "the borrowing and lending of money is commerce that falls within Congress' broad commerce power" and observed that "this area is not clearly reserved to the states under the Tenth Amendment." Nat'l Home Equity Mortgage Ass'n, 64 F. Supp. 2d at 592 (reproduced in Pet. Writ Cert. at 14a-15a). "[W]hen the power is delegated, as it is here through the Commerce Clause, then the power of Congress is plenary and it can act to the exclusion of laws of the states." *Id.* (reproduced in Pet. Writ Cert. at 15a).

2. Petitioners' second argument that the court of appeals did not reconcile the preemptive reach of the Parity Act with DIDA was not raised below and is not meritorious.

Petitioners' argument that the Parity Act should be construed and harmonized with DIDA is a novel claim that was not raised before the Court of Appeals and should not be considered by this Court. *See* Delta Air Lines, *supra*; Davis, *supra*; Breininger, *supra*; and other related cases cited in § 1.

Notwithstanding their failure to preserve this point, this argument is clearly meritless. First, there is no established equivalency between the Parity Act and DIDA so that they should be construed *in pari materia*. *See* Grunbeck v. The Dime Sav. Bank of N.Y., FSB, 74 F.3d 331, 343 (1st Cir. 1996) (noting that "'the Parity Act and the Monetary Control Act serve related but distinctly different functions'") (citation omitted).

Second, Petitioners state that both the Parity Act and DIDA pertain to "federally related mortgage loans."[15] (Pet. Writ Cert. at 11.) This fatally undermines Petitioners' Tenth Amendment and "no federal preemption" arguments because "federally related mortgage loans" are encompassed within Congress' plenary Commerce Clause powers and are subject to federal, not state, statutes and regulations.

Third, their belief that DIDA allows states to regulate or cap prepayment penalties on mortgages that are subject to the Parity Act is in open conflict with the express language of the Parity Act. (Pet. Writ Cert. at 12.) While Petitioners maintain that prepayment penalties are not preempted under DIDA at 12 U.S.C. § 1735f-7a, Congress stated in the Parity Act, which was enacted after DIDA, that "[s]ection 501(c)(1)

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[15] This term is also defined under RESPA at 12 U.S.C. § 2602(1).

of [DIDA] [now 12 U.S.C. § 1735f-7a] shall not apply to transactions which are subject to [the Parity Act]." 12 U.S.C. § 3805.

Petitioners' assertion that "the decision below results in conflicting state and federal rules relating to prepayment penalties applying to the same loan" is a *non sequitur*. The Parity Act precludes the application of 12 U.S.C. § 1735f-7a, and regulations like 12 C.F.R. § 590.3(c) adopted thereunder, to alternative mortgage transactions, and it further overrides conflicting state statutes like Va. Code Ann. §§ 6.1-330.83 & 6.1-330.85 that frustrate Congressional intent by denying parity in those states like Virginia that did not opt out of federal preemption under 12 U.S.C. § 3804(a).

3. Petitioners' theory that the panel below "concluded, erroneously, that Virginia law was preempted, because [it] (1) failed to construe [the Parity Act] as a whole, (2) failed to consider post-enactment FHLBB actions under [the Parity Act], and (3) misconstrued the 'history' surrounding [the Parity Act's] enactment" is plainly wrong.

First, their view that an uncodified note following 12 U.S.C. § 3801 "establishes the means of setting the bounds on [the Parity Act's] preemption of states' laws" is patently mistaken. (*Id.*) Section 807(b) of the Parity Act directed the FHLBB (and other agencies not relevant here) within sixty days of October 15, 1982, to

> identify, describe, and publish those portions of their . . . regulations that are inappropriate for (and thus inapplicable to), or that need to be conformed for the use of, nonfederally

> chartered housing creditors to which their . . . regulations apply . . . .

12 U.S.C. § 3801, note.

The FHLBB identified regulations that it would not apply to non-federally chartered housing creditors, the FHLBB publishing at 12 C.F.R. § 545.33(f) (1983), the regulations that it would require such lenders to follow in order to be on par with federally chartered housing creditors. All other regulations were declared inapplicable. (*See* Pet. Writ Cert. at 59a.) Significantly, housing creditors for single family dwellings for more than four families in the aggregate were not required to follow any federal regulations, but were instead completely deregulated and allowed to be covered by market forces.[16] 47 Fed. Reg. 51,732, 51,734 (1982).

Petitioners misread the framework of the Parity Act by contending that this uncodified note somehow limits the rulemaking authority of the OTS. (Pet. Writ Cert. at 13-18.) After all, the Parity Act itself had already put the states on clear notice that the subject of alternative mortgage transactions was being preempted by federal regulation with no restriction on the OTS' power to alter and amend those regulations. Congress merely required the OTS to identify those regulations that state-chartered housing creditors must

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[16] This decision highlights Petitioners' error in supposing that only those regulations listed pursuant to 12 U.S.C. § 3801, note, have preemptive effect and that all state laws on other subjects would continue to apply. If this were indeed so, then the fact that no federal regulations apply to certain categories of housing creditors would mean that the transactions that they would make, purchase, or enforce would be entirely subject to state law. This would contradict the intended purpose of the Parity Act, namely that nonfederally and federally chartered housing creditors and banking institutions be subject to the same set of laws when they make, purchase, and enforce alternative mortgage transactions in compliance with applicable OTS regulations and that that same set of laws be federal laws.

obey before they can avail themselves of federal preemption under the Parity Act.[17]

The Parity Act reveals that Congress never ordered the OTS to specify which regulations would or would not have preemptive effect on "any State constitution, law or regulation." 12 U.S.C. § 3803(c). Instead, Congress notified state-chartered housing creditors that if they complied with whatever regulations were specified in 12 C.F.R. § 545.33(f), they had the capacity and right to make, to purchase, and to enforce alternative mortgage transactions in full parity with federally chartered institutions "notwithstanding any State constitution, law, or regulation." *Id.*

Hence, it is inconsequential whether the FHLBB initially identified and published in 12 C.F.R. § 545.33(f) the federal regulation permitting federally chartered housing creditors to charge prepayment penalties subject to the terms of the loan contract. Housing creditors merely had to follow and comply with those regulations that were identified and published before being able to make, purchase, and enforce alternative mortgage transactions without regard to any state constitution, law, or regulation, including state laws like Va. Code Ann. §§ 6.1-330.83 & 6.1-330.85 purporting to cap

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[17] Congress obviously required the agency to identify which regulations would apply to state-chartered housing creditors so that those creditors would have a reliable understanding of the criteria they must meet before they could avail themselves of federal preemption under the Parity Act. This is shown by the fact that when the FHLBB initiated rulemaking proceedings in 1982, and also in 1996 when the OTS amended the list to include the federal regulation permitting prepayment penalties, it provided notice to housing creditors, not states. 47 Fed. Reg. 51,732, 51,732 (1982); 61 Fed. Reg. 50,951, 50,953 (1996). Contrary to Petitioners' claims, there is no evidence that § 3801 was drafted for the convenience of states wishing to opt out under 12 U.S.C. § 3804(a). Indeed, it is apparent on its face that § 3801 was drafted to insure that federal regulations would properly "fit" state-chartered housing creditors.

prepayment penalties. Of course, the OTS has since expressly clarified this analytical framework by amending 12 C.F.R. § 545.33 to include 12 C.F.R. § 560.34, which permits the use of a prepayment penalty subject to terms of the loan contract, and by recasting 12 C.F.R. § 545.33(f) into the current 12 C.F.R. § 560.220.[18]

Now, so long as (1) a state did not opt out of federal preemption in the prescribed manner set forth in 12 U.S.C. § 3804(a) and (2) a housing creditor complies with the applicable OTS regulations listed by 12 C.F.R. § 560.220, including the regulation permitting prepayment penalties subject to the terms of the loan contract, a housing creditor can avail itself of federal preemption under the Parity Act.

Petitioners' argument that the uncodified note at 12 U.S.C. § 3801 required a list to be issued in sixty days and that this requirement prevented the OTS from ever changing its regulations thereafter as they apply to state-chartered institutions is contrary to both the text and the purpose of the Parity Act and to all known tenets of administrative law. (Pet. Writ Cert. at 13-18.)

Congress provided in 12 U.S.C. § 3803(a)(3) that state-chartered housing creditors may make, purchase, and enforce alternative mortgage transactions if they first comply with identified "regulations governing alternative mortgage transactions as issued by the Director of the [OTS] for federally chartered savings and loan associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the [OTS] with regard to

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[18] (*See* Pet. Writ Cert. at 78a-79a.) The district court correctly concluded that the OTS' actions were entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Nat'l Home Equity Mortgage Ass'n, 64 F. Supp. 2d at 590 (reproduced at Pet. Writ Cert. at 10a.)

federally-chartered savings and loan associations under laws other than this section." (emphasis added).

There is no temporal limit stated in the statute and the "as issued" language gave notice that there was no such limit. Obviously, there is no canon of construction that would allow an uncodified note to limit the OTS' expressly granted rulemaking authority. Furthermore, the creation of any limitation of the type urged by Petitioners would defeat the stated purpose of the Parity Act by having regulations applicable to state and federally chartered housing creditors diverge over time rather than remain in parity. Finally, the legislative history of 12 U.S.C. § 3801 shows that regulations governing nonfederally chartered housing creditors are amendable. S. Rep. 97-463 at 55 (quoted *supra* at 6).

Therefore, the 1996 OTS rulemaking proceeding to amend the list of regulations applying to state-chartered housing creditors to include the federal regulation allowing prepayment penalties was a valid exercise of administrative authority in accordance with the Parity Act. And, of course, Virginia made no timely challenge to that rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*

The court of appeals court was clearly correct when it concluded that under

> the Parity Act and the regulations, to which it explicitly refers . . . when a non-federally chartered housing creditor elects to be governed by federal law and complies with that law, it may charge a contractually specified prepayment fee as authorized by federal law, despite the fact that Virginia law provides otherwise. Any other rule would contradict the explicit language of 12

> U.S.C. § 3803(c) which provides that 'an alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation.' It would also deny the non-federally chartered housing creditor parity with federal institutions when entering into alternative mortgage transactions.

Nat'l Home Equity Mortgage Ass'n, 239 F.3d at 639 (reproduced at Pet. Writ Cert. at 33a.)

Petitioners[2] overarching argument that the Parity Act did not and does not preempt Virginia's statutes limiting prepayment penalties and that the 1996 regulations were unauthorized is simply incorrect.

The decision below was not only correct, but was the only possible one which would vindicate the stated purpose of the Parity Act:

> It is the purpose of this title to eliminate the discriminatory impact that those [federal] regulations have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies.

12 U.S.C. § 3801(b).

CONCLUSION

Tellingly, Petitioners cite no case law to support their contentions that Va. Code Ann. §§ 6.1-330.83 & 6.1-330.85 are not preempted by federal law pursuant to the Parity Act. Because their convoluted arguments are squarely contrary to the legislative history and language of the Parity Act, or are doctrinally wrong, and because the decision below applying settled law to undisputed facts neither conflicts with other federal or state appellate court decisions nor presents unique questions of federal statutory interpretation, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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No. 0-1851

IN THE SUPREME COURT OF THE UNITED STATES

E. JOSEPH FACE, JR., COMMISSIONER OF FINANCIAL INSTITUTIONS, BUREAU OF FINANCIAL INSTITUTIONS, VIRGINIA STATE CORPORATION COMMISSION, and SUSAN E. HANCOCK, DEPUTY COMMISSIONER, BUREAU OF FINANCIAL INSTITUTIONS, VIRGINIA STATE CORPORATION COMMISSION,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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APPENDIX

FILED
Jun 14 1999
Clerk, U.S.
District Court
Richmond, VA
/s/ DSA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond, Virginia

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION	)	
Plaintiff,	)	
	)	Case No.: 3:99cv398
E. JOSEPH FACE, JR., et al.	)	
Defendants.	)	

ORDER

On June 11, 1999, the parties came before the Court on the plaintiff's motion for a preliminary injunction. The Court having considered the verified complaint, the affidavits submitted by the parties, and the briefs and argument of counsel under the factors set forth in Blackwelder Furn. Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977), is of the opinion that a preliminary injunction

should issue. WHEREFORE defendants are enjoined from enforcing with respect to any alternative mortgage transaction made by a housing creditor in compliance with the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. § 3801 *et seq.*, (the "Act"), defendants' announced position that such compliance will nonetheless not preempt Va. Code §§ 6.1-330.83 and 6.1-330-85. The Court is informed that plaintiff does not seek a determination that any individual transaction complies with the Act, and this injunction does not address the rights of defendants with regard to that issue.

This injunction shall become effective upon the plaintiff's filing a letter of credit in the amount of Ten Thousand and No/100 Dollars ($10,000.00), conditioned according to law. The injunction shall continue until further order of the Court.

ENTERED: June 14, 1999

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

I ask for this:

/s/ E. Duncan Getchell, Jr.
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